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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JEFFERSON HULL,

Defendant and Appellant.

B228136

(Los Angeles County
Super. Ct. No. SA073552)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Katherine Mader, Judge. Affirmed.

Helen S. Irza, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Susan Sullivan Pithey and
Taylor Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Jefferson Hull appeals from a judgment of conviction after a jury trial. The jury found defendant guilty of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))¹ in count 1. Defendant was found not guilty of battery with serious bodily injury (§ 243, subd. (d)) in count 2, but he was convicted of the lesser included offenses of misdemeanor simple assault and battery (§§ 240, 242).² The jury found not true the allegation in count 1 that defendant personally inflicted great bodily injury upon the victim (§ 12022.7, subd. (a)).³

Defendant was sentenced to state prison for the upper term of four years on count 1. The court granted the People's motion to dismiss count 2 and the prior conviction and prior prison term allegations.

On appeal, defendant contends that the trial court erred when it failed to instruct on accomplice testimony. We affirm.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² The information jointly charged codefendants Lewis Reader and Crispin Barrymore in counts 1 and 2. Barrymore was additionally charged with possession of methamphetamine. (Health & Saf. Code, § 11377, subd. (a).) Barrymore ultimately pled guilty to the charges. Reader and defendant were tried together. Reader and Barrymore are not parties to this appeal.

³ The record does not contain the jury's finding on the personal use of a deadly weapon allegation (§ 12022, subd. (b)(1)) accompanying count 1. At sentencing, the People indicated that the jury had found that a deadly weapon was used. From the record, it appears that defendant did not receive a weapon use enhancement.

FACTUAL BACKGROUND

Prosecution

Sometime in the summer of 2009, Crispin Barrymore (Barrymore) met Jeffrey Barthold (Barthold) on the Venice Beach boardwalk. Barthold is a drummer. The two men went to Barthold's apartment and played music together. Barthold was not doing well financially, and Barrymore offered to let Barthold live in his garage, which had been converted into a music studio (studio). Barthold was supposed to clean Barrymore's property.

In the following months, Barthold had some disagreements with Barrymore and Barrymore's girlfriend,⁴ who began sleeping over at the main house. Barrymore asked Barthold to move out at least three times. He eventually filed an unlawful detainer action, and Barthold was given a three-day notice to quit, but Barthold still did not move out.

On February 6, 2010, at about 1:00 a.m., Barthold was playing his drums in the studio when he heard a knock on the door. Lewis Reader (Reader) was at the door and said he was an electrician and that Barrymore had asked him to come by to do electrical work. Even though it was late at night, Barthold did not find it to be unusual because the studio had serious electrical problems and Barrymore lived an eccentric lifestyle. Barthold told Reader that he had to check with Barrymore before he could let Reader do any work.

Barthold went to the main house to look for Barrymore. He found him standing outside the front door talking to a man wearing a Halloween mask. Barrymore confirmed that he had asked Reader to do electrical work. Barthold returned to the studio and told Reader that he could proceed with the work and then went back to playing his drums.

⁴ The girlfriend's father is codefendant Lewis Reader.

Sometime later, the lights in the studio went off. Barthold then heard a loud bang on the door like someone was trying to break it down, but a door chain stopped the door from opening. Barthold heard two or three men yelling, “You’re leaving tonight,” “You’ve stayed too long,” and telling him to get out. He saw defendant, Reader, a third man—later identified as James Scott—and a pit bull outside the door. The men were trying to use a lead pipe, baseball bat, and/or ax handle to pry the door open. Thinking he might escape if the men came crashing inside, he stepped away from the door to let the men in.

Reader fell in first and Barthold knocked him out of the way. Defendant, who came through the door second, “poked” Barthold on the side with a stick or “something blunt.” Scott then hit him in the head with a stick or pipe, knocking him backwards. Barthold felt blood running down his head. Barthold saw that each of the men “had something” in his hands, and one of the objects was “definitely a long lead pipe.”

Barthold managed to escape. He saw Barrymore “watching the whole thing happening” from inside the main house. Barthold ran out to the street and flagged down a police car. A police officer saw Barthold “covered in blood.” Barthold was treated by paramedics at the scene for wounds or lacerations on his head. He told the police that he believed Barrymore had hired the men to get him off the property.

During the subsequent investigation, the police found “a bunch of sticks, poles, [and] a lot of things that could have been used in the incident” just outside the front door of the studio. Inside the studio was a seven-foot lead pipe.

Barthold suffered from vision problems and headaches as a result of the assault.

Barrymore⁵ testified that he knew Reader, defendant and Scott, and had complained to Reader about Barthold squatting on his property. Additionally, at his girlfriend’s request, Barrymore had allowed Robert Simperts (Simperts) to move into his

⁵ Barrymore was required to testify for the prosecution under the terms of his plea agreement, which also included participation in a year-long, live-in substance abuse program.

house to “mak[e] it uncomfortable for Jeff Barthold to live there.” Barrymore had Simperts serve Barthold with the three-day notice to quit.

On the night of the incident, Reader came to Barrymore’s house to fix the electrical problems, although Barrymore had not requested that the work be done that evening. Shortly after Reader’s arrival, defendant and Scott came to Barrymore’s house with a pit bull. Simperts asked Barrymore what he should do. Barrymore knew that Reader was unhappy with Simperts and would be upset if he knew that Simperts was staying with Barrymore, so Barrymore told Simperts to go to his room.

Barrymore discussed with Reader the electrical work. During the conversation, Barrymore got the impression that the men were there to evict Barthold. Barrymore told Reader not to forcibly remove Barthold that night and to wait at least until the next morning.

Sometime later, Scott told Barrymore that “they would be taking care of business” and “how many people [they were] going to have to beat up.” Scott asked whether Simperts was in the back house with Barthold. Barrymore said that Simperts was in his bedroom. Reader and defendant were present while Barrymore and Scott “were discussing where Rob Simperts was and how many people would he have to deal with.”

At some point, Reader told Barrymore that he was going to shut off the electricity to both the studio and the main house. After the electricity was shut off, Barrymore saw the three men head toward the backyard. The power went off and Barrymore heard “thuds” and “bangs” “like there was some sort of altercation going on.” Barrymore sat in the dark while this happened “because [he] didn’t want to have anything to do with what was going on.”

Reader, Scott and defendant returned to the house, but Scott left shortly thereafter. Barrymore, Reader and defendant went upstairs. Reader ordered Barrymore not to warn Simperts about what had happened. About 40 minutes later, the police knocked on the door, and Simperts answered. The police called for Barrymore, and he came downstairs and went with them.

Barrymore denied that he had any agreement to compensate the men for removing Barthold, although he believed the men expected something in return, possibly drugs.

Defense

Reader testified in his own defense. According to Reader, Barrymore told him at the end of December that he was having electrical problems. Barrymore gave him a hundred dollars cash and a check for \$185 and asked him to come over and fix the problems. Reader went to the bathroom when he arrived at Barrymore's house and could not find Barrymore when he came out. He walked back to the studio and saw Barthold. Reader introduced himself as an electrician and asked Barthold where Barrymore was. Barthold went to find Barrymore and Reader looked at the electrical panel.

At some point, defendant agreed to help Reader replace outlet covers that he had removed while investigating the electrical problem. The power went out as they were putting things back in place. Reader heard people "thumping around, [and] people tripping." Reader heard Barrymore say something had happened and he was going outside to talk to the police. Reader stayed inside, because there was methamphetamine paraphernalia all over the bedroom where he was sitting, and he did not want to be blamed for it. Twenty minutes later, the police arrested Reader.

DISCUSSION

Defendant contends the trial court erred and violated state law and his federal constitutional rights by failing to instruct the jury pursuant to CALCRIM No. 334 on accomplice testimony.⁶ While we agree the trial court erred in failing to give this instruction, we hold the error to be harmless.

⁶ CALCRIM No. 334 states in pertinent part that before the jury "may consider the (statement/ [or] testimony) of _____ <insert name[s] of witness[es]> as evidence against (the defendant/ _____ <insert names of defendants>), [regarding the crime[s] of _____ <insert name[s] of crime[s] if corroboration only required or

Section 1111 provides that “[a] conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.” Where an accomplice testifies, the trial court must instruct the jury sua sponte that the accomplice’s testimony is to be viewed with distrust and that the defendant cannot be convicted on the basis of the accomplice’s testimony unless that testimony is corroborated. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) No such instruction was given here.

“An accomplice is . . . defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” (§ 1111.) To be charged with the identical offense, the witness must be considered a principal under section 31, which provides, “All persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed.” (See *People v. Fauber* (1992) 2 Cal.4th 792, 833.) The defendant has the burden “to prove by a preponderance of the evidence that a witness is an accomplice.” (*Id.* at p. 834.) If “the evidence at trial would warrant the jury in concluding that a witness was an accomplice of the defendant in the crime or crimes for which the defendant is on trial, the trial court must instruct the jury to determine if the witness was an accomplice.” (*People v. Hayes*

some crime[s]>], you must decide whether _____ *<insert name[s] of witness[es]>* (was/were) [an] accomplice[s] [to (that/those) crime[s]].” If the jury determines that the witness was an accomplice, CALCRIM No. 334 further instructs that the jury “may not convict the defendant of _____ *<insert charged crime[s]>* based on his or her (statement/ [or] testimony) alone. You may use the (statement/ [or] testimony) of an accomplice to convict the defendant only if: [¶] 1. The accomplice’s (statement/ [or] testimony) is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice’s (statement/ [or] testimony); [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime[s].” The instruction further informs the jury to view with caution a statement or testimony “of an accomplice that tends to incriminate the defendant.”

(1999) 21 Cal.4th 1211, 1270-1271; *People v. Felton* (2004) 122 Cal.App.4th 260, 267-268.)

Here, there was evidence which would warrant the jury in concluding that Barrymore was an accomplice to the assault committed against Barthold. Barrymore had tried to evict Barthold from the studio, but Barthold had refused to leave. According to Barrymore's own testimony, he got the impression that Reader, defendant and Scott came to the property to evict Barthold. Yet when Barthold asked him, Barrymore confirmed that he had asked Reader to do electrical work. When the men broke into the studio and attacked Barthold, Barrymore "watch[ed] the whole thing happening" from inside the main house.

From the foregoing evidence, the jury could infer that Barrymore knew that Reader, defendant and Scott were there to evict Barthold forcibly, and Barrymore assisted them by telling Barthold that Reader was there to fix the electricity, so Barthold would not suspect what was going to happen. This would make Barrymore liable for the crime as an aider and abettor (*People v. Champion* (1995) 9 Cal.4th 879, 928), and thus an accomplice.

The jury was entitled to disbelieve Barrymore's self-serving testimony that he told Reader not to remove Barthold forcibly that night, that Scott, defendant and Reader were going to "tak[e] care of business" by beating up Simpser; and that Barrymore sat in the dark while everything happened "because [he] didn't want to have anything to do with what was going on." Since there was evidence supporting a finding that Barrymore was an accomplice, the trial court was required to instruct the jury on accomplice testimony. (*People v. Zapien, supra*, 4 Cal.4th at p. 982.)

However, "the failure to instruct on accomplice testimony pursuant to section 1111 is harmless where there is sufficient corroborating evidence in the record. [Citations.] The requisite corroboration may be established entirely by circumstantial evidence. [Citations.] Such evidence "may be slight and entitled to little consideration when standing alone. [Citations.]" [Citation.] "Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element

of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged.” [Citation.]’ [Citation.]” (*People v. Zapien, supra*, 4 Cal.4th at p. 982.) If there is insufficient corroboration, “the omission of accomplice instructions [is held] to the harmless error analysis for state law error under *People v. Watson*[(1956)] 46 Cal.2d [818,] 836.” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 304.)

Barrymore’s testimony implicating defendant in the assault was corroborated by independent evidence. Barthold testified that he saw defendant, Reader and Scott outside the studio door prior to the assault. The men were yelling obscenities and telling him that he was leaving that night. The men also tried to pry the door open with a pipe and wooden object. Defendant “poked” Barthold with a stick or blunt object. While Barthold could not identify the exact object defendant used in the assault, he did state that he suffered two blows and defendant delivered one of the blows.

Defendant attacks Barthold’s credibility, indicating that he gave varying accounts of his attack. As stated above, the corroborating evidence ““may be slight”” and the corroborative evidence need not ““establish every element of the offense charged.”” (*People v. Zapien, supra*, 4 Cal.4th at p. 982.) The jury’s province is to determine the credibility of the witnesses. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) Based upon their verdict, the jury obviously believed Barthold’s trial testimony that defendant hit him with an object that was capable of causing and likely to cause death or great bodily injury.

In addition, the jury was given CALCRIM No. 226, which deals with judging the credibility or believability of the witnesses. The instruction included in part the following language, “Was the witness promised leniency in exchange for his or her testimony?” The California Supreme Court has stated that the purpose of section 1111 is to compel the jury to treat accomplice testimony with distrust and suspicion. (*People v. Miranda* (1987) 44 Cal.3d 57, 101, disapproved on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.) Since “the jury had before it ample information suggesting that [Barrymore’s] testimony may not have been completely trustworthy”

(*Miranda, supra*, at p. 101), CALCRIM No. 226 allowed the jury to view Barrymore's testimony with distrust, as CALCRIM No. 334 would have done.

Moreover, the jury knew that Barrymore had pled guilty in connection with the assault. With this knowledge, the "jury would have been inclined to view [Barrymore's] testimony with caution even in the absence of an instruction that it do so" (*People v. Williams* (2010) 49 Cal.4th 405, 456.)

In sum, any error as a result of the trial court's failure to instruct the jury on accomplice testimony in accordance with CALCRIM No. 334 was harmless.

DISPOSITION

The judgment is affirmed.

JACKSON, J.

We concur:

WOODS, Acting P. J.

ZELON, J.